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*Targeted Strikes
in the "Global War on Terror"*

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*"We're at war. There has been an act of war declared upon America by terrorists... The wreckage of New York City was the signs of the first battle of war."*¹

President George W. Bush, September 15, 2001

Death from Above

On November 4th, 2002, Qaed Salim Sinan al-Harethi (a.k.a., "Abu Ali"), thought to be the top Al-Qa'eda operative in the country of Yemen and a major player in the *U.S.S. Cole* attack, climbed into a Jeep SUV with four other men. Unbeknownst to Al-Harethi and his companions, at that very moment a pilotless drone circled silently above them at an altitude of 10,000 feet. The \$5 million Predator,² a UAV (Unmanned Aerial Vehicle) equipped with the latest in hi-tech video, infrared, and radar cameras and armed with two missiles,³ had been relaying full motion video of the suspected terrorists' movements to a Ground Control Station, 150 miles away in the country of Djibouti. As al-Harethi's vehicle turned onto a deserted road in the Yemeni countryside, the remote-controlled drone launched a Hellfire missile at its target. In a flash, the Jeep and its five occupants were incinerated.⁴ His passengers burned beyond recognition, little was left of al-Harethi: he had to be identified by a mark on his leg, which had been blown clear in the blast.⁵ For the first time, the United States had personally targeted and killed an al-Qa'eda member outside the borders of a war zone, in a country with which we were not at war.⁶

In the immediate aftermath of the lethal Predator strike on al-Harethi, the President and the Central Intelligence Agency (CIA) — identified by unnamed government officials as having been behind the operation — declined to comment publicly. Deputy Secretary of Defense Paul Wolfowitz later generally confirmed the



strike in an interview on CNN, designating it “a very successful tactical operation.”⁷

Richard Boucher, a spokesman for the Department of State who, as late as March 2002, had condemned Israel’s openly stated policy of conducting “targeted killings” in the occupied Palestinian territories, also refused to talk specifically about the Yemen strike, while still steadfastly maintaining that “[o]ur policy on targeted killings in the Israeli-Palestinian context has not changed.”⁸ Yet, media reports indicated that, as early as the fall of 2001, President Bush had already issued a classified “finding” authorizing the use of covert, lethal action against specifically listed “high value targets,” to include Osama bin Laden and approximately two dozen other individually-named Al Qaeda operatives.⁹

While the Bush administration remained officially silent, the report of the successful strike unleashed a flurry of opinions and commentary regarding both the legality of targeted strikes and the ultimate effectiveness of their use as a strategy. The incredible, science-fiction-like vaporization of a suspected al-Qa’eda terrorist in a friendly country seemed to signal a new level of aggressiveness in the “Global War on Terror,” yet the strategic ramifications of this escalation seemed unclear.

In point of fact, President Bush was not the first Chief Executive to order such a targeted strike. President Bill Clinton had signed several orders “authorizing the CIA to use lethal force to apprehend bin Laden,”¹⁰ issuing the command to execute cruise missile strikes of his training camps and a factory in Afghanistan in 1998, after al-Qa’eda was linked to the bombings of several U.S. embassies throughout Africa which killed over 200 people. The missiles failed to hit bin Laden, but the White House allegedly struggled with defining a legal basis for the bold attempt to kill him, “arguing that he was, in effect, a piece of terrorist ‘infrastructure’ to be ‘degraded.’”¹¹ According to one

commentator, “[t]he Bush administration has taken a leap ahead in clarity by frankly stating that Osama bin Laden is a person, just an evil one who deserves to be sent to his eternal reward as quickly as possible.”¹²

Unfortunately, use of the term “clarity” to describe the latest policy is simply inapt, as any “leap ahead” has been directly into the muddy grip of a legal swamp. Killing evil-doers hardly constitutes a valid legal basis for targeted strikes, much less indicates an articulable, coordinated strategy. Off the record, government officials defended the Yemen strike on the basis that “the US was engaged in a war, and... was dealing with enemy combatants,” but as this paper will discuss, this is a tortured and potentially dangerous argument which also ultimately fails.¹³

This paper proposes that a valid legal argument can and must be made for the reasonable use of targeted strikes, and that within that legal structure, these strikes can be an effective component of an overall strategy to destroy the al-Qa’eda network. Contrary to many voices who argue that because “9/11 changes everything,” legality is no longer relevant, the concept that these strikes can be consistent with the rule of law-- and not just the vengeful, unrestrained response of a lone superpower unbound in the world-- is crucial to our ultimate success in defeating al-Qa’eda. Legality *does* matter, all the more so because Al-Qa’eda— “an organization of Islamic extremists as well as an ideology of Islamic extremism”¹⁴-- denies that it does. Osama bin Laden himself specifically rejects any attempt to distinguish between lawful and unlawful targets, in war or peacetime, stating in a 1998 “World Islamic Front Statement” to his followers: “The ruling to kill the

Americans and their allies -- *civilians and military* -- is an individual duty for every Muslim who can do it, in any country in which it is possible to do it..."¹⁵

This paper intends to cut through the confusion regarding targeted strikes, examine the issue in the context of "The Global War on Terror," and make the case that such strikes, properly conducted, can be both legal and effective within an overall strategy of eliminating the al-Qa'eda threat. This paper will show that-- rather than a hindrance-- the law and its sensible interpretation, development and application, is integral to our ultimate success. Absent this approach, we risk antagonizing the very allies we need to keep beside us in this vital undertaking, while inviting comparisons to those terrorists who, rejecting every cherished legal principle of the world community, vow to attain their goal of establishing "a pan-Islamic Caliphate throughout the world"¹⁶ - even if they risk destroying humanity itself in doing so.

More Than Semantics

Many terms for targeted strikes are often used interchangeably, adding to the confusion regarding legality. These terms themselves are loaded with meaning, and include "assassinations," "targeted killings," "summary executions" and "extra-judicial killings." For our purposes, a "targeted strike" refers to the act of targeting an individual with lethal force. It is a tactic—albeit with important strategic implications-- born of unprecedented advances in surveillance and precision-guided missile technology. Its legality—and effectiveness—depend wholly on how, when and where it is used. The international reaction to the Yemen strike is an excellent case study for framing the issue and examining its ramifications.

Although many commentators and some government officials around the world have referred to al-Harethi's killing as an assassination, the Yemen strike can be clearly distinguished. The United States does have an official policy against political assassinations. After Congressional hearings led by Senator Frank Church publicized a CIA program to covertly kill certain heads of state during peacetime—notably Fidel Castro in Cuba, Rafael Trujillo in the Dominican Republic, and Ngo Dinh Diem in Vietnam¹⁷-- President Gerald Ford issued Executive Order 11905, Section 5 of which provides:

(g) Prohibition of Assassination. No employee of the United States Government shall engage in, or conspire to engage in, political assassination.¹⁸

Both Presidents Jimmy Carter and Ronald Reagan issued their own executive orders upholding the ban on assassination, the latest of which, President Reagan's E.O. 12333, has never been revoked. None of them specifically defined the word "assassination," however, and the Carter and Reagan versions leave out the word "political," but the general thrust of the orders has been interpreted as prohibiting the intentional killing of an individual "for political purposes"¹⁹ during peacetime. Current White House spokesman Ari Fleischer confirmed this view, stating that "[t]here's an executive order that prohibits the assassination of foreign leaders, and that remains in place."²⁰

Even Osama bin Laden himself, as the "CEO" of a dispersed network of terrorists cells we refer to as al-Qa'eda, does not qualify as a foreign leader, nor is he being targeted for political reasons. His status as the head of a transnational terrorist organization which is actively involved in planning ongoing crime, by definition, places him outside both the letter and the intent of Executive Order 12333. It follows, then, that

the killing of a subordinate terrorist chief within this crime syndicate, such as al-Harethi, similarly cannot constitute an “assassination.”

In distinguishing between the Yemen strike and unlawful assassinations, however, National Security Advisor Condoleezza Rice went further, indicating that al-Qa’eda operatives are “enemy combatants” operating all around the world. “We’re in a new kind of war,” said Rice on a Fox News program six days after the strike, “and we’ve made it very clear that this new kind of war [will] be fought on different battlefields.”²¹ “Given the degree of violence in [the attacks of 9/11], and the nature and scope of the organization necessary to carry them out,” labeling our present campaign to eradicate al-Qa’eda as a “war”-- is a natural response.²² Doing so, however, inadvertently invokes the terms of the *lex specialis*²³ of the Law of Armed Conflict, causing more problems than it solves. Within the context of “The Global War on Terrorism,” and outside of combat operations in Iraq and Afghanistan, that body of law simply does not apply, nor for many reasons, would we want it to.

The Rules of the Game

"Early on, I said, 'I'm a baseball fan. I want a scorecard'... And I understood that when you're fighting an enemy like al-Qa'eda, people - including me - didn't have a sense of who we're fighting. And I have actually got a chart."²⁴

President George W. Bush

The question of “who we’re fighting” is a critical one. According to Common Article 2 of the Geneva Conventions, the Law of Armed Conflict applies in “cases of declared war or of any other armed conflict which may arise between two or more of the

High Contracting Parties, even if the state of war is not recognized by one of them.”²⁵ Under international law, then, states alone enjoy “a monopoly on violence.”²⁶ That is, bin Laden’s “Fatwah” notwithstanding, only states may grant persons “combatant status,” authorize them “to take part in hostilities against other state,” and “carry out acts that would otherwise be unlawful, without sanction.”²⁷ In international armed conflicts, combatants may legally target the other side’s combatants and other legitimate military targets with immunity. If captured, they become prisoners of war, but they may not be prosecuted for acts of war which are not otherwise unlawful under the Law of Armed Conflict (for example, they may be tried and punished for targeting civilians, who are “protected persons,” but not for carrying out an attack on a valid military targets).

Among the many novel questions the term “Global War on Terrorism” raises, then, is, “How does one conduct war against individuals or groups of individuals who swear no allegiance to any nation, and whose affiliations to each other are not always clear?”²⁸ Whatever else al-Qa’eda may be, it is a non-state actor, and therefore it cannot grant combatant status to any of its members. This is as it should be: if we were truly to recognize their status as combatants, an al-Qa’eda member who plotted to kill as many U.S. soldiers as possible by attacking their barracks with a massive truck bomb — as happened in 1996, at the Khobar Towers in Dhahran, Saudi Arabia, where nineteen Americans lost their lives²⁹ — could not be charged with any crime. If captured, such an attacker would be considered a prisoner of war who must be released at war’s end, a classification which we have steadfastly rejected.³⁰

Before invoking the Law of International Armed Conflict, we must realize that it was never designed to draw any moral distinctions between the cause of one side or the

other, but rather applies the principle of reciprocity to assign the same privileges, rights, and responsibilities to the armed forces of both.³¹ In the case of our global struggle against al-Qa'eda, we have appropriately resisted treating them as our fellow warriors on the battlefield. President Bush himself has correctly labeled them "barbaric criminals who profane a great religion by committing murder in its name," and "outlaws and killers of innocents."³² This paper suggests that they should be treated accordingly.

Fighting Words

"Thanks to the work of our law enforcement officials and coalition partners, hundreds of terrorists have been arrested. Yet, tens of thousands of trained terrorists are still at large. These enemies view the entire world as a battlefield, and we must pursue them wherever they are. So long as training camps operate, so long as nations harbor terrorists, freedom is at risk. And America and our allies must not, and will not, allow it."

President George W. Bush,
State of the Union Address, 2002

In this country, we are accustomed to working within the constraints of *Posse Comitatus*—we see military action and law enforcement as two separate and never-to-meet approaches. Domestically, this is a valid view, but abroad, the constraints of the *Posse Comitatus Act* do not apply.³³ As President Bush did in his State of the Union Address, we must recognize that al-Qa'eda is a new kind of threat, one that lurks somewhere on the continuum between law enforcement and conventional war, and that when it comes to defeating them, we must be prepared to use the assets at our disposal all along that spectrum. Rather than dignifying members of al-Qa'eda by labeling them

combatants-- and thus triggering the Law of Armed Conflict and a host of unintended consequences-- or simply falling back into some sort of passive, "pre-9/11 mindset,"³⁴ this paper proposes that al-Qa'eda and associated terrorist networks be dealt with according to an "Enhanced" Law Enforcement Model.

Al-Qa'eda casts its violent campaign against the United States and other governments as a "transnational insurgency" of unlimited proportions.³⁵ All indications are that al-Qa'eda is actively engaged in attempting to obtain Weapons of Mass Destruction (WMD) capable of threatening the continued survival of humanity on this planet.³⁶ They characterize each of their vicious attacks on civilian and military alike -- and the even more ominous ones promised in the future -- as simply one more battle engagement within their "holy war" or "jihad." Notwithstanding efforts to wrap "warlike" attacks in the guise of legitimate acts of war, according to international and domestic criminal law, these attacks simply constitute crimes of the gravest kind. This paper suggests that it is this legal regime, and not the Law of Armed Conflict, which properly applies, which best allows the United States and its allies to seek and destroy al-Qa'eda, and which supplies the requisite rules and principles needed to construct a valid legal basis for targeted strikes.

A New Paradigm

The first step, as noted above, is to recognize the al-Qa'eda organization as a syndicate of transnational criminals, albeit exceedingly well-organized, ideologically motivated, and highly dangerous ones.³⁷ Next, the United States must establish clear and specific guidelines for employing targeted strikes abroad -- that is, the use of lethal force

– against a small and select number of high-ranking al-Qa’eda members as identified through the best available intelligence. The concept of a framework for authorizing “lethal” or “deadly” force is a well-known one in Police Departments and S.W.A.T. (Special Weapons and Tactics) Teams around the world. Using as our template the International Association of Chiefs of Police (IACP) Model Policy on the Use of Force,³⁸ and adapting it to the targeted strikes scenario might read as follows:

- (1) *With the consent and/or assistance of the foreign government, efforts should be made to apprehend suspected Al-Qa’eda terrorists, if feasible.*

This does not at all imply that only police may effect the arrest: any combination of suitable forces— military, para-military, CIA, etc. — may be used to find and apprehend terrorist suspects and bring them to trial.

- (2) *Lethal force is authorized to protect the arresting forces or others from death or serious bodily harm or, due to the extreme danger posed, to prevent the escape of a fleeing Al-Qa’eda operative.*

- (3) *If it can be shown that*

- (a) *an arrest is not feasible, e.g., a foreign government is either unable or unwilling to either make the arrest or allow American or allied forces to do so,*

- and

- (b) *death or serious injury to civilians can be minimized or avoided,*

Then the President may authorize Lethal Force in the form of a Targeted Strike in lieu of attempting capture.

Here, we are extending the normal Lethal Force policy one crucial (and, admittedly, highly controversial) step further in response to the “clear and present danger” posed by a specific type of criminal-- a high-ranking al-Qa’eda operative

actively orchestrating further criminal operations -- whose capture is either so difficult or so dangerous, that a targeted strike becomes the only remaining reasonable option. In the case of Mr. al-Harethi-- considered the highest-ranking al-Qa'eda member in Yemen when he was struck by the Predator -- an earlier attempt to apprehend him in the lawless, remote area in which he and his heavily-armed men had been hiding out resulted in the deaths of eighteen Yemeni troops.³⁹ Additional attempts to capture him would likely have been just as futile, resulting in further loss of life while potentially allowing the suspected mastermind behind the *U.S.S. Cole* bombing to escape arrest indefinitely, and leaving him free to plan and execute further heinous crimes.

Facing the Global "Smell" Test

"If the president can order such an operation,
he should be able to defend it publicly."⁴⁰

Many opponents of targeted strikes have expressed the concern that, in ordering an individualized strike, an American President (or one of his agents) acts as judge, jury and executioner, and argue that "[t]o kill people without some assessment of guilt is morally inappropriate, and that would mean some kind of trial."⁴¹ One of the most vocal critics of the Yemen strike, Swedish Foreign Minister Anna Lindh, warned that, "[e]ven terrorists must be treated according to international law. Otherwise, any country can start [summarily] executing those whom they consider terrorists."⁴² Any policy sanctioning targeted strikes, it is feared, will "erode" the United States' ability to restrain other states around the world, inadvertently "justifying their own attacks on perceived enemies."⁴³

Yet, other commentators have noted that it is the "intentionally vague" nature of the current rules for targeted strikes that sets "a dangerous precedent for both the United

States and other countries to follow.”⁴⁴ Our current policy is unspoken and unknown; it is not transparent to other countries who must try to make sense of our actions. As one commentator noted, “If we do this outside the traditional combat area of Afghanistan, in Yemen -- could we not do it in Germany, Ottawa, or even in Cincinnati?”⁴⁵

The “Enhanced” Law Enforcement Model is no panacea for the difficult challenge of legally justifying targeted strikes on certain suspected al-Qa’eda cadre: many thorny questions remain to be answered, not least of which is determining the requisite quality and timeliness of intelligence for identifying such an individual as a high-level al-Qa’eda operative and determining that his continued freedom poses a grave and immediate threat.⁴⁶ The “Enhanced” model does, however, provide a framework for a policy that “is not arbitrary and completely open-ended,”⁴⁷ but rather is driven by rational, articulable considerations consistent with principles of democratic accountability.⁴⁸ Admittedly, the “Enhanced” model does go a critical step further than the traditional law enforcement approach in permitting the use of lethal force in targeted strikes, but it does so in a very limited, carefully proscribed number of cases in which lesser alternatives are unavailable,⁴⁹ and in a manner which appropriately respects principles of state sovereignty. In the aftermath of 9/11 and the many changes it has wrought in the world, we must not, as UN Secretary General once phrased it, “shy away from questions about the adequacy, and effectiveness, of the rules and instruments at our disposal.”⁵⁰ Rather, we must engage the world community in a legal discourse to develop and shape international law in ways that will ensure its responsiveness in light of the grave threat posed to all nations by al-Qa’eda, and the rapid advancements in Predator-type technology which we hope will help to defeat that threat.

Legality as an Element of Strategy

“The behavior of our enemies obviously isn’t going to be positively influenced by our nice legalisms.”⁵¹

It is true that the al-Qa’eda mentality is largely impervious to arguments of legality; such concepts simply have no meaning within the context of their dark world view. But it is also true that legitimacy and legal process do matter to the rest of humanity, to the governments and populations of the countries we must recruit and retain as allies in the struggle for a different, better and more secure future. In al-Qa’eda, “[w]e face a foe more dangerous than a traditional nation-state, because it has a nations-state’s goals and resources, draws manpower from a 1.3 billion-person pool, has no fixed address to attack, and fights for a cause in which death while killing enemies earns paradise.”⁵² If the United States is to effectively counter the deadly threat posed by al-Qa’eda, it must “seek to develop and sustain a multi-pronged, multi-dimensional, multi-agency and a multinational response,”⁵³ rather than decide to act as a lone military superpower unbound and unbothered by legal considerations.

The individualized strike capability of the Predator makes it an awesome tool in our campaign against Osama bin Laden and his key followers: it combines an incredible surveillance and tracking capability with uncanny targeting accuracy. It allows a real-time response to intelligence streams from inaccessible locales, permitting quick strikes to decapitate remotely dispersed, active al-Qa’eda cells with little risk to either friendly troops or civilians. But because “[i]n the foreseeable future, human intelligence and covert strike forces will remain at the heart of fighting secret and highly motivated

organizations like Al Qa'eda,"⁵⁴ the benefit to be gained by technologically advanced weapons systems such as the Predator will be blunted if we use them in a manner which alienates our allies and further antagonizes and radicalizes the world's Muslim population. A "Targeted Strike" policy, grounded in a common understanding and respect for international law principles, and which offers clear, articulable guidelines for its implementation, will ensure and enhance the value of the Predator as a key component of a coordinated strategy to find, engage and defeat al-Qa'eda.

¹ [Sic], President George W. Bush, as quoted by Ian Christopher McCaleb, CNN Washington Bureau, "Bush Works Phones to Build Coalition," 15 September 2001, accessed at <http://archives.cnn.com/2001/US/09/15/bush.terrorism/>

² See Eric Schmitt, "U.S. Drones Crowding Skies Over Iraq and Afghanistan," *The New York Times*, April 5, 2005, p. A-1.

³ USAF Factsheet, http://www.af.mil/news/factsheets/RQ_1_Predator_Unmanned_Aerial.html

⁴ Ian Urbina, "On the Road with Murder, Inc.," *Asia Times*, January 26, 2003, p. 3.

⁵ James Risen, "CIA Seeks and Kills al-Qaeda Chief," November 6, 2002, *The New York Times*, accessed at <http://www.smh.com.au/articles/2002/11/05/1036308313504.html?oneclick=true>

⁶ Pamela Hess, UPI Pentagon Correspondent, "Experts: Yemen Strike Not Assassination," 11/8/2002, accessed at www.upi.com/view.cfm?StoryID=20021107-042725-6586r

⁷ "U.S. missile strike kills al Qaeda chief; CIA drone launched missile Tuesday," CNN, November 5, 2002, accessed at <http://www.cnn.com/2002/WORLD/meast/11/05/yemen.blast/>

⁸ Max Boot, "Retaliation for Me, But Not for Thee: *A foolish inconsistency is the hobgoblin of the State Department*," *Weekly Standard*, November 18, 2002, Volume 008, Issue 10, accessed at <http://www.weeklystandard.com/Content/Public/Articles/000/000/001/883gplpc.asp?pg=2>

⁹ James Risen and David Johnston, "Bush Has Widened Authority of CIA to Kill Terrorists," December 15, 2002, *The New York Times*, accessed at www.globalpolicy.org/wtc/targets/2002/1215cia.htm According to Risen and Johnston, unnamed senior military and intelligence officials confirmed that the administration has "prepared a list of terrorist leaders the Central Intelligence Agency is authorized to kill, if capture is impractical and civilian casualties can be minimized."

¹⁰ Bill Clinton, *My Life*, (Alfred A. Knopf, NY: 2004), at 804.

¹¹ Richard Lowry, "A View to a Kill: Assassination in war and peace," *National Review*, March 11, 2002 accessed at http://www.findarticles.com/p/articles/mi_m1282/is_4_54/ai_83117148 p. 4.

¹² Ibid.

¹³ BBC News, "US 'still opposes' targeted killings,"

Wednesday, 6 November, 2002, accessed at http://news.bbc.co.uk/2/low/middle_east/2408031.stm

¹⁴ "Plots, Alarms and Arrests," Special Report: Chasing al-Qaeda, *The Economist*, August 14th, 2004, p.24.

¹⁵ "Jihad Against Jews and Crusaders," World Islamic Front Statement, 23 February 1998, at <http://www.library.cornell.edu/colldev/mideast/wif.htm>, *italics mine*.

¹⁶ U.S. Special Operations website at http://www.specialoperations.com/Terrorism/Terrorist_Groups/al_qaeda2.htm

According to Special Operations.com, Al-Qaeda hopes to bring about the Caliphate “by working with allied Islamic extremist groups to overthrow regimes it deems “non-Islamic” and expelling Westerners and non-Muslims from Muslim countries.”

¹⁷ Lowry, at http://www.findarticles.com/p/articles/mi_m1282/is_4_54/ai_83117148 p. 4.

¹⁸ Executive Order 13095, accessed at http://www.archives.gov/federal_register/executive_orders/print_friendly.html?page=1998_content.html&title=NARA%20%7C%20Federal%20Register%20%7C%20Executive%20Orders

¹⁹ Elizabeth B. Bazan, “Assassination Ban and E.O. 12333: A Brief Summary,” CRS Report for Congress, Order Code RS21037, Updated January 4, 2002.

²⁰ “Valid Target? Policy Forbids Killing Foreign Leaders; Should that Mean Saddam, al Qaeda?” ABCNEWS.com, Washington, March 16, 2004, *accessed at* <http://www.ftlcomm.com/ensign/currentEvents/iraqWarII/fair/targetABC.pdf> or http://more.abcnews.go.com/sections/nightline/World/iraq_assassination03 As is well known, a key aspect of the “Shock and Awe” warplans for Operation Iraqi Liberation was the “decapitation” of Iraqi military command and control, to include specifically targeting Saddam Hussein himself. In the context of this armed conflict between the US-led coalition nations and Iraq, the argument can properly be made that the Iraqi President-- who wore a uniform and personally directed military operations-- was a combatant (who upon his capture became a prisoner of war) and was, therefore, a valid military target.

²¹ Anthony Dworkin, “The Yemen Strike: The War On Terrorism Goes Global,” 14 November 2002, Global Policy Forum, *accessed at* <http://www.globalpolicy.org/wtc/targets/2002/1114crimes.htm>

²² American Bar Association, *TASK FORCE ON TREATMENT OF ENEMY COMBATANTS PRELIMINARY REPORT*, August 8, 2002, Neal R. Sonnett, Chair, *accessed at* http://www.abanet.org/leadership/enemy_combatants.pdf

²³ Meaning “Specific Law”—the Law of Armed Conflict is a sub-set of International Law as a whole.

²⁴ Toby Harnden, “Bush keeps photo hit-list of enemies,” The News Telegraph, 04/02/2002, *accessed at* <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2002/02/04/wwar04.xml&sSheet=/news/2002/02/04/ixnewstop.html>

²⁵ Common Article 2, 1949 Geneva Conventions.

²⁶ Charles Garraway, “Interoperability and the Atlantic Divide – A Bridge Over Troubled Waters,” Israel Yearbook on Human Rights, 34 (2004), 105, edited by Yoram Dinstein and Fania Domb, Martinus Nijhoff Publishers, Leiden – Boston, at 107.

²⁷ Garraway, at 108.

²⁸ American Bar Association Task Force on Terrorism and the Law, Preliminary Report, p. 18. http://www.abanet.org/leadership/enemy_combatants.pdf

²⁹ “Terrorism and Crime Studies,” Federal Research Division, The Library of Congress, *accessed at* <http://www.loc.gov/rr/frd/Khobar.htm>

³⁰ The U.S. has labeled detainees held in Guantanamo Bay as “enemy combatants” while refusing to grant Prisoner of War status. Their continued detainment there has “become a running sore” in relations with our European allies, according to Professor Charles Garraway. Garraway, p. 107.

³¹ Law of war expert and retired British Army General A.P.V. Rogers notes an additional, intrinsic problem with the “global war” paradigm: it does not allow for the use of the CIA to conduct targeted strikes against Al Qaeda operatives. “[I]t has long been recognized that hostilities are only to be conducted by the uniformed armed forces of a party to the conflict.” Rogers point[s] to Article 43(2) of the First Additional Protocol to the Geneva Conventions, which reads: ‘Members of the armed forces of a Party to the conflict (other than medical personnel and chaplains...) are combatants, that is to say, they have the right to participate directly in hostilities.’ (Although the United States is not a party to the Additional Protocol, this passage is widely thought to reflect customary international law.)” Thus, would the use of the CIA render an agent, sitting in her Langley office and piloting the remote controls for a Predator flying somewhere over the Middle East, a “combatant,” and therefore a legitimate military target? And wouldn’t the CIA agent also become an “unprivileged belligerent” subject to prosecution for war crimes (i.e., murder)? Anthony Dworkin, “The Yemen Strike: The War On Terrorism Goes Global,” 14 November 2002, *Global Policy Forum*, accessed at 2002 <http://www.globalpolicy.org/wtc/targets/2002/1114crimes.htm>

³² President George W. Bush, announcing the commencement of operations in Afghanistan, as quoted in “America Launches Strikes Against Al Qaeda, Taliban,” by Jim Garamone, *American Forces Press Service*, Washington, Oct. 7, 2001, accessed at http://www.dod.gov/news/Oct2001/n10072001_200110071.html

³³ The *Posse Comitatus* Act (PCA), Title 18, U.S. Code, Section 1385.

³⁴ President Richard Cheney, as quoted in “Cheney: Kerry win risks terror attack. Edwards says Cheney ‘crossed the line’ with comment,” CNN.com, Tuesday, September 7, 2004 Posted: 9:09 PM EDT (0109 GMT), accessed at <http://www.cnn.com/2004/ALLPOLITICS/09/07/cheney.terror/>

In context, Vice President Cheney said, “Because if we make the wrong choice, then the danger is that we’ll get hit again, that we’ll be hit in a way that will be devastating from the standpoint of the United States, and that we’ll fall back into the pre-9/11 mindset if you will, that in fact these terrorist attacks are just criminal acts, and that we’re not really at war. I think that would be a terrible mistake for us.”

³⁵ Anonymous, *Imperial Hubris: Why the West is Losing the War on Terror* (Brassey’s, Inc: 2004), at 246.

³⁶ Mahan Abedin, THE ESSENCE OF AL QAEDA: AN INTERVIEW WITH SAAD AL-FAQIH, *The Jamestown Foundation*, August 04, 2004. Dr. al-Faqih claims that al-Qaeda has infiltrated Russian intelligence, and is attempting to obtain nuclear weapons. Accessed at <http://www.ladlass.com/intel/archives/003908.html>.

³⁷ Currently, Osama bin Laden tops the FBI’s “Ten Most Wanted Fugitives” and “Wanted Terrorists” list. See <http://www.fbi.gov/homepage.htm>

³⁸ See David Bruce, “The Legal Framework on the Use of Lethal Force in Effecting Arrest - a new Section 49?”, particularly Annexure B: International Association of Chiefs of Police (IACP) Model Policy on the Use of Force, Memorandum produced by the Centre for the Study of Violence and Reconciliation, South Africa, March 2002, accessed at <http://www.csvr.org.za/papers/papbruc4.htm>

³⁹ Ori Nir, “Bush Seeks Israeli Advice on ‘Targeted Killings’”, *The Forward*, February 7, 2003 accessed at www.forward.com/issues/2003/03.02.07/news5.html The U.S. Predator strike was conducted with the

permission of the Yemeni government, which was also instrumental in providing the necessary intelligence to identify and track al-Harethi.

⁴⁰ Jeffrey Richelson, senior fellow at the National Security Archive, as quoted by Margot Patterson in "Assassination as a Weapon: Despite Moral Qualms, Killing Enemy Leaders Reconsidered as a War Tactic," National Catholic Reporter, Sept. 6, 2002, p.4.

⁴¹ Professor Robert Johansen, Professor of Government and International Studies at the University of Notre Dame, as quoted in Peterson, at 1.

⁴² Hess, at www.upi.com/view.cfm?StoryID=20021107-042725-6586r

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Scott Silliman, as quoted in Hess, at www.upi.com/view.cfm?StoryID=20021107-042725-6586r.

⁴⁶ On February 4, 2002, during Operation Enduring Freedom, an American Predator targeted an innocent Afghan civilian collecting metal scraps in the mountains near the village of Zhawar. The man, who happened to be slim and of above-average height, was mistaken for Osama bin Laden, and killed along with two companions. See Doug Struck, "Casualties of U.S. Miscalculations: Afghan Victims of CIA Missile Strike Described as Peasants, Not Al Qaeda," *The Washington Post*, February 11, 2002, page A-1, accessed at <http://www.washingtonpost.com/ac2/wp-dyn/A55268-2002Feb10?language=printer>

⁴⁷ Hess, at www.upi.com/view.cfm?StoryID=20021107-042725-6586r.

⁴⁸ According to Article 6, clause 1, of the 1966 International Convention on Civil and Political Rights, which the U.S. has signed and ratified, "Every human being has the inherent right to life. This right shall be protected by law. No one shall be *arbitrarily* deprived of his life." (*Italics mine*).

⁴⁹ A further constraint on targeted strikes is a purely practical one: the most preferable option in terms of intelligence and investigative value is always to apprehend terrorist suspects alive —and seize their papers, cell phones, laptops, and disks intact.

⁵⁰ Kofi Annan, UN Secretary General, addressing the General Assembly, 23 September 2003.

⁵¹ Richard Lowry, "A View to a Kill: Assassination in war and peace," *National Review*, March 11, 2002 accessed at http://www.findarticles.com/p/articles/mi_m1282/is_4_54/ai_83117148, p. 4.

⁵² Anonymous, *Imperial Hubris: Why the West is Losing the War on Terror* (Brassey's, Inc, NY: 2004), at 246.

⁵³ Rohan Gunaratna, "The Rise and Decline of Al Qaeda," *Third public hearing of the National Commission on Terrorist Attacks Upon the United States*, Statement to the National Commission on Terrorist Attacks Upon the United States, July 9, 2003, accessed at http://www-11commission.gov/hearings/hearing3/witness_gunaratna.htm

⁵⁴ Rohan Gunaratna.